No. 82-1462

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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1982

DAVID L. HERBST,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

ALBERT H. BEAVER
Attorney for Petitioner
118 North Lawton Place
Sturgeon Bay, Wisconsin 54235
(414) 743-8242

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QUESTION PRESENTED

1. Whether petitioner was denied effective assistance of counsel in violation of rights secured to him by the Sixth and Fourteenth Amendments of the United States Constitution when petitioner's trial counsel questioned him before the jury with respect to conviction of a crime and introduced evidence with respect thereto knowing that such questioning and introduction of evidence was prohibited under Wisconsin law.

2. Whether the conduct of petitioner's trial counsel in failing to seek an advance determination from the trial judge with respect to the admissibility of prior conviction evidence because of his fear of offending the judge was the result of incompetence or without a basis in reason.

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No.

In The

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October Term, 1982

DAVID L. HERBST,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

The petitioner, David L. Herbst, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Court of Appeals, District III, entered in this proceeding on October 19, 1982.

OPINION BELOW

The opinion of the Wisconsin Court of Appeals, District III, not reported upon recommendation of the Court, appears in the appendix hereto.

JURISDICTION

The judgment of conviction was rendered by the Circuit Court of Marinette County on August 5, 1980, convicting petitioner, upon a jury verdict, of 18 counts of medicaid fraud contrary to Wisconsin statutes.

On September 30, 1980, petitioner was sentenced to serve one year in jail, with work release privileges, and was fined $18,000.

On October 19, 1982, the Wisconsin Court of Appeals, District III, affirmed the judgment and orders of the trial court.

On December 23, 1982, the Wisconsin Supreme Court denied a petition to review the adverse decision of the Court of Appeals.

This petition for certiorari was filed within 60 days of that date.

This Court's jurisdiction is believed to be invoked under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments of the United States Constitution are involved herein, the pertinent portions of which are set forth in the appendix.

Also involved is Wis. Stat. 906.09(3) relating to impeachment by evidence of crime which provides that:

> No questions inquiring with respect to conviction of a crime, nor introduction of evidence

with respect thereto shall be permitted until the judge determines pursuant to 901.04 whether the evidence shall be excluded. (See appendix)

STATEMENT OF THE CASE

The petitioner is a Doctor of Dental Surgery, licensed to practice dentistry in the State of Wisconsin.[1] He graduated from the Marquette University Dental School in 1973, and following service in the United States Navy, began the practice of dentistry in Milwaukee and Marinette, Wisconsin. He became an eligible provider under the State of Wisconsin Medical Assistance Program.

As a result of an investigation by the Medicaid Fraud Central Unit of the Wisconsin Justice Department, Dr. Herbst was charged with 16 counts of medical assistance fraud alleging that he had not performed services and 4 counts alleging that he performed unnecessary services, all of which he billed to the Medical Assistance Program. Nine patients were involved and the total dollar amount involved was $743.15.

Trial counsel planned a defense based upon the fact that Dr. Herbst actually performed the services billed to the medical program but because of the complex maze of paper work required to be completed by the Program, he inadvertently billed the services in the name of the wrong patients.

In preparation for this defense, trial counsel interviewed the patients on whom the services were actually performed and had them available as witnesses to testify on behalf of Dr. Herbst.

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1. Based solely on the fact of this criminal conviction, the State of Wisconsin revoked petitioner's license to practice dentistry in the State of Wisconsin.

However, during the State's case, trial counsel decided not to present any evidence through the testimony of the actual patients to support this defense theory but elected to rely solely on the credibility of Dr. Herbst's testimony.

At the close of the State's case and prior to the defendant's case, counsel for the State announced to the court outside the presence of the jury that he had been advised that Dr. Herbst was going to testify on his own behalf and that he believed that Dr. Herbst's trial counsel was going to examine him on direct concerning prior convictions. The State's counsel requested permission to inquire into the nature of the crimes, arguing that the nature of the crimes was relevant on the issue of intent. The court refused to permit this inquiry.

A few minutes before Dr. Herbst took the witness stand, his trial counsel told him that he had made a "small error in the law" when he earlier had advised Dr. Herbst to plead guilty to two misdemeanors because he had thought only evidence of felony convictions were admissible for impeachment purposes; that he was going to ask him on direct examination whether he had ever been convicted of a crime and that he should answer exactly: "Yes, one time - two crimes."

Dr. Herbst was then called as the first witness for the defense by his trial counsel. At the outset of the questioning on direct examination, trial counsel asked him if he had ever been convicted of a crime, to which he answered "yes". Counsel then asked him how many times and he answered "one time - two crimes". Counsel then proceeded to his direct line of questioning.

Counsel for the State referred repeatedly in his final argument to Dr. Herbst's lack of credibility and his untruthfulness. He directly called to the attention of the jury the fact that the court would be reading to them an instruction concerning conviction

of a crime "not one crime but two crimes" and credibility. He requested that they listen carefully to that instruction.

The court instructed the jury that they were entitled to consider the prior convictions in weighing Dr. Herbst's testimony and determining his credibility.

The jury found Dr. Herbst guilty of 18 of the 20 counts.

Timely notice of appeal was filed with the Wisconsin Court of Appeals, District III. On April 27, 1981, appellate counsel for petitioner moved the court for an order remanding the matter for an evidentiary hearing as required by *State v. Machner,* 92 Wis. 2d 797, 285 N.W. 2d 905 (1979) and *State v. Simmons,* 57 Wis. 2d 285, 203 N.W. 2d 887 (1973) on the issue of effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

On May 7, 1981, the Court of Appeals entered an order on its own motion, for good cause shown, permitting voluntary dismissal of the appeal and extending the time for filing a motion for postconviction relief. On May 15, 1981, petitioner filed a motion for postconviction relief seeking a new trial on the constitutional grounds that petitioner was denied effective assistance of counsel.

At the evidentiary hearing, trial counsel testified that he knew that Dr. Herbst had been previously convicted of a crime and was vulnerable to being impeached if he testified on his own behalf. Trial counsel testified that he was fully aware of Wis. Stat. 906.09(3) which prevents the suggestion of inadmissible prior conviction evidence to the jury. Trial counsel testified that he was also fully aware that he had never requested that the trial judge make a determination outside the presence of the jury as to whether the evidence should be excluded. The reason trial

counsel gave for not producing the witnesses that he had planned to call was because he thought they would not make a good impression. The reason trial court gave for never requesting a determination on the issue relating to the exclusion of the conviction evidence was that he did not want to offend or anger the judge.

Two expert witnesses testified that in their opinion, this representation by trial counsel was not equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services.

REASONS FOR GRANTING THE WRIT

No procedural standards exist in the State Courts of Wisconsin which permit a meaningful evidentiary hearing for the purpose of determining whether a criminal defendant was denied effective assistance of counsel.

Petitioner has the burden of proving by clear and convincing evidence that his trial counsel's conduct was the result of incompetence, or was without a basis in reason.

Petitioner has filed exhaustive briefs with appropriate authorities on the constitutional issues involved in this case with both the trial court and the Court of Appeals. Notwithstanding, the trial court failed to recognize its own responsibility to preserve petitioner's due process and fair trial rights and summarily denied all postconviction relief based upon a failure of proof. The Court of Appeals likewise failed to recognize the importance of petitioner's right to a fair trial and merely adopted the findings of the trial court.

The legal controversy of significance here is demonstrated by the fact that the reviewing courts in the State of Wisconsin

have never reversed a criminal conviction based upon a denial of effective assistance of counsel.

The Court of Appeals here approved a procedure to remand the issue of ineffective assistance of counsel to the trial court for an evidentiary hearing to allow trial counsel an opportunity to explain his conduct at trial so that the Court of Appeals could determine whether or not his conduct was the result of incompetence or deliberate trial strategy. However, the Court of Appeals failed to independently consider all the evidence adduced at the postconviction hearing from the viewpoint of the petitioner and the protection of his rights to a fair trial but instead, considered the issues from the viewpoint of protecting the reputation of trial counsel by justifying his conduct in retrospect. This is made clear by the court's statement that "In ruling on the postconviction motion, the trial court confirmed the attorney's impression that the motion to exclude evidence of the prior convictions would not have been granted."

The ruling of the trial court confirming trial counsel's conduct after the fact does not erase the prejudice that was created in the minds of the jurors that convicted Dr. Herbst, nor does it cure the gross constitutional error committed by his trial counsel.

The only way for the court to remedy the wrong to petitioner was for the court to grant a new trial and rule on the admissibility of the conviction evidence in advance so that trial counsel may properly prepare and present the defense evidence accordingly.

The failure of the Court of Appeals to independently review all the evidence adduced at the postconviction hearing for the protection of petitioner's rights rather than trial counsel's reputation is further demonstrated by the court's statement that "Herbst must show that his counsel's representation did not meet

the standards set out in *State v. Harper* (cite). There is no such showing."

Trial counsel testified that the reason for his conduct was that he did not want to offend or anger the judge. Two expert witnesses testified at the hearing and they both agreed that in their professional legal opinion, this reasoning was not sound trial strategy, but the result of incompetence and below the standard set in *Harper*. None the less, the Court of Appeals concluded that the trial court's finding was not against the great weight and clear preponderance of the evidence.

Aside from the obvious error and the gross miscarriage of justice here, the problem appears to have been created by the procedure prescribed by the Court of Appeals itself in ordering the evidentiary hearing to be conducted in the form of a motion for postconviction relief and allowing the trial judge to make findings. The trial judge in this case had the ultimate responsibility of preventing any question inquiring with respect to conviction of a crime or introduction of evidence with respect thereto until he first determined outside the presence of the jury whether the evidence should be excluded. The trial court was clearly in error for permitting the questions and the introduction of the evidence and as such could not be impartial in ruling on who was responsible for the error.

In summary this Court should continue in its development of the law as it relates to Sixth Amendment effective assistance of counsel rights and force state courts to eliminate vague and arbitrary procedural standards for conducting evidentiary hearings in such cases. Failure to act will allow at least the State of Wisconsin to continue with a practice which in effect is a total grant of immunity to incompetent attorneys at the expense of the rights of the criminally accused.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ALBERT H. BEAVER
Attorney for Petitioner

APPENDIX

OPINION OF THE WISCONSIN COURT OF APPEALS FOR THE THIRD DISTRICT

Office of the Clerk

SUPREME COURT
STATE OF WISCONSIN

To

Hon. William Donovan
Circuit Court of Marinette County
Br. 2, Marinette County Courthouse
Marinette, WI 54143

Tim Duket
District Attorney
Marinette County Courthouse
Marinette, WI 54143

Madison, December 23, 1982

Albert H. Beaver
118 N. Lawton Place
Sturgeon Bay, WI 54235-3499

Michael J. Losse
Asst. Attorney General

The Court today announced an order in your case as follows:

No. 81-2442-CR *State v. David L. Herbst*

Opinion

The court having considered the defendant-appellant's (David L. Herbst) petition for review from the adverse decision of district III of the court of appeals filed October 19, 1982:

IT IS ORDERED, the petition is denied. No costs.

MARILYN L. GRAVES
Clerk of Supreme Court

Opinion

No. 81-2441-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID L. HERBST,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Marinette County: WILLIAM E. DONOVAN, Judge.

Affirmed:

Before Foley, P.J., Dean and Cane, JJ.

PER CURIAM. The sole issue on appeal is whether David Herbst was denied effective assistance of counsel on the ground that his counsel questioned him regarding prior convictions without first seeking a ruling on whether the trial court would allow instruction of those convictions. The trial court found that Herbst had effective counsel and it denied his postconviction motions. Because we conclude that the trial court's finding is not against the great weight and clear preponderance of the evidence, we affirm.

Opinion

Herbst was asked by his counsel on direct examination whether he had been convicted of a crime and how many times. Trial counsel explained that he believed the evidence would be admitted and, based upon this impression, thought it was preferrable to have his client testify to the convictions himself on direct examination. In ruling on the postconviction motions, the trial court confirmed the attorney's impression that the motion to exclude evidence of the prior convictions would not have been granted. The other convictions were closely related in time and in substance to the crimes charged in this case. They bore directly on Herbst's credibility. While in the exercise of caution, an attorney might have confirmed his impression by seeking a ruling from the court; an attorney is not ineffective if he fails to make a motion that would have and should have been denied.

Upon our examination of the entire record, we agree with the trial court that counsel did an admirable job during this lengthy and complex trial. Counsel spent a great number of hours preparing for trial and was diligent and frequently successful in representing Herbst at trial. Any error in relying upon his correct impression that the court would deny the motion, rather than testing the issue by making the motion, is inconsequential in light of counsel's performance during the entire trial. *See generally State v. Schill,* 93 Wis.2d 361, 381, 286 N.W.2d 836, 845-46 (1980). Herbst must show that his counsel's representation did not meet the standards set out in *State v. Harper,* 57 Wis.2d 543, 557, 205 N.W.2d 1, 9 (1973). There is no such showing. The trial court's finding that Herbst had effective counsel is not against the great weight and clear preponderance of the evidence.

By the Court. --Judgment and orders affirmed.

Inclusion in the official reports is not recommended.

Opinion

APPENDIX

1. *State v. Nye*, 100 Wis.2d 398, 410, 302 N.W.2d 83, 89 (Ct. App. 1981) *aff'd per curiam*, 105 Wis.2d 63, 312 N.W.2d 826 (1981).

RELEVANT CONSTITUTIONAL PROVISIONS

AMENDMENTS TO THE UNITED STATES CONSTITUTION

Article VI.

In all criminal prosecutions, the accused shall. . . .and to have the Assistance of Counsel for his defense.

Article XIV.

. . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

906.09 Impeachment by evidence of conviction of crime. (1) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible. The party cross-examining him is not concluded by his answer.

(2) EXCLUSION. Evidence of a conviction of a crime may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

(3) ADMISSIBILITY OF CONVICTION. No question inquiring with respect to conviction of a crime, nor introduction of evidence with respect thereto shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded. . . .